

**United States Department of Labor
Employees' Compensation Appeals Board**

MARYLOU CACCAVALE, Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
New York, NY, Employer**

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**Docket No. 04-585
Issued: June 7, 2004**

Appearances:

*Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On March 24, 2003 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated December 1, 2003 which terminated appellant's wage-loss compensation on the grounds that she had refused an offer of suitable work and denied her request for partial wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issues are: (1) whether the Office properly terminated appellant's compensation benefits based upon her refusal of an offer of suitable employment pursuant to 5 U.S.C. § 8106(c); and (2) whether appellant is entitled to wage-loss compensation for partial disability.

FACTUAL HISTORY

On July 10, 1998 appellant, a 42-year-old taxpayer education specialist, filed a traumatic injury claim (Form CA-1) alleging that she injured her right knee on June 11, 1998 when she

tripped and fell over a washing device a window washer pulled down as she was passing. The Office accepted the claim for right knee contusion, right knee abrasion and subluxation of the right lateral patella which was subsequently expanded to include low back pain as a consequential injury. The Office authorized physical therapy for up to three times per week and right knee arthroscopy, which occurred on June 2, 1999. Appellant was placed on the automatic rolls for temporary total disability by letter dated October 22, 1998.

Appellant returned to limited-duty work on August 1, 2000 and stopped work on August 2, 2000. The Office accepted that appellant sustained a recurrence of disability on August 2, 2000 due to the June 11, 1998 employment injury.

In a February 15, 2001 report, Dr. Raymond A. Shebairo, a Board-certified orthopedic surgeon, reported continued patellofemoral irritation, weakness in the vastus medialis, low back pain, paresthesias radiating down into her legs and “left-sided S.I. joint inflammation.” He concluded appellant remained totally disabled and continued to require physical therapy.

In a report dated June 4, 2001, Dr. Ira M. Turner, a second opinion Board-certified neurologist, concluded there was no objective evidence of any neurological problem. He noted that there were orthopedic problems and deferred disability to an orthopedic consultant.

In a June 29, 2001 report, Dr. Dwiref Mehta, a second opinion Board-certified surgeon, concluded appellant was capable of performing her usual duties as a tax technician with no restrictions. He diagnosed small central disc protrusion at L4-5, posterior disc bulge at L5-S1 and status post right knee arthroscopic surgery. Dr. Mehta opined there was “no objective findings for the accepted conditions of subluxation of the right lateral patella and low back pain which is active and causing disabling residuals.”

On September 26, 2001 the Office referred appellant to Dr. Donald I. Goldman¹ to resolve the conflict in the medical opinion evidence between Dr. Shebairo and Dr. Mehta on whether appellant had any continuing disability due to her accepted employment injury.

In an October 22, 2001 report, Dr. Goldman, based upon a physical examination, statement of accepted facts and review of the medical record, concluded appellant was capable of performing the duties as “a tax technician starting at [four] hours a day with gradual improvement.” The physician reported “weakness with atrophy present in the right leg” and the “patella no longer subluxes, although there is clicking evidence.” Regarding the lumbar spine, he found the range of motion within normal limits and no evidence of reflex sympathetic dystrophy. He further opined that appellant continued to have residuals from her accepted employment injury.

On March 28, 2002 the employing establishment offered appellant the limited-duty position of modified tax specialist. Initially, appellant would be working four hours per day and progressing up to eight hours per day within two months. The physical requirements of the position included no lifting more than five pounds, no standing or sitting for more than four

¹ Dr. Goldman notes that he is a Fellow of the American Academy of Disability Evaluating Physicians. He is not listed as Board-certified by the American Board Medical Specialties.

hours, walking for four to six hours and squatting, kneeling and climbing for up to one to two hours.

On March 29, 2002 the Office advised appellant it had found that offered position suitable, that she had 30 days to accept the position or provide explanation of the reasons for refusing it, and that any claimant that refused suitable employment would not be entitled further compensation.

Appellant declined the position on April 24, 2002 on the grounds that she was medically unable to accept the position.

On May 1, 2002 the Office notified appellant that her reasons for refusing the offer of suitable work were unacceptable. Appellant was given an additional 15 days to accept the job offer “and was advised that, if she did not accept the position, her compensation would be terminated.”

Appellant’s counsel responded in a letter dated May 8, 2002 and contended that any termination was unwarranted.

By decision dated May 20, 2002, the Office terminated appellant’s wage-loss compensation on the basis that she refused an offer of suitable work. The Office found that the weight of the medical evidence of record rested with the impartial medical examiner.

In a May 20, 2002 report, Dr. Shebairo reported satisfactory range of motion in the right knee and “patellofemoral irritation is still present.” Appellant presented complaints of discomfort in her right knee, continued low back pain which radiated into her legs and persistent subluxation. Dr. Shebairo opined appellant was disabled and unable to return to work. He recommended she continue physical therapy.

In a report dated June 25, 2002, Dr. Shebairo released appellant to light-duty work as of June 17, 2002. Appellant returned to limited-duty working four hours per day on June 17, 2002.²

Appellant submitted a claim for compensation (Form CA-7) for the period June 17 to 28, 2002 for her partial disability.

In a July 12, 2002 letter, the Office advised appellant that she was not eligible to receive further compensation benefits on the grounds that the penalty provision of 5 U.S.C. § 8106(c)(2) had been invoked based upon her refusal of an offer of suitable work.

Subsequently, appellant submitted additional claims for compensation (Form CA-7) for partial disability for the period July 1 to October 17, 2003.

Appellant’s counsel requested reconsideration on October 8, 2002.

² The employing establishment indicated that, due to a reorganization, appellant’s former position no longer existed, but that she had returned to work in a similar position.

By decision dated January 31, 2003, the Office denied appellant's request for modification. The Office also found that since appellant had refused an offer of suitable work that she was not entitled to wage-loss benefits.

In a decision dated May 8, 2003, the Board remanded the case for reconstruction of the record as the record was missing several key items of evidence.³ The Board further set aside the Office decisions dated January 31, 2003 and May 20, 2002 and remanded the case to the Office for further action.

By merit decision dated December 1, 2003, the Office affirmed the termination of appellant's compensation benefits pursuant to 5 U.S.C. § 8106(c). The Office also found that the penalty provision of 5 U.S.C. § 8106(c) was invoked due to her failure to accept an offer of suitable work and thus precluded appellant from receiving any subsequent wage-loss compensation for her accepted employment injury.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.⁴ This burden of proof is applicable if the Office terminates compensation, under 5 U.S.C. § 8106(c), for refusal to accept suitable work.⁵ Furthermore, in situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such a specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁶

Under section 8106(c)(2) of the Federal Employees' Compensation Act⁷ the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.⁸ The Board has recognized that section 8106(c) is a penalty provision which must be narrowly construed.⁹

³ Docket No. 03-998 (issued May 8, 2003).

⁴ *Linda D. Guerrero*, 54 ECAB ____ (Docket No. 03-267, issued April 28, 2003).

⁵ *Juan A. Dejesus*, 54 ECAB ____ (Docket No. 03-1307, issued July 16, 2003).

⁶ See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

⁷ 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

⁸ *Sandra K. Cummings*, 54 ECAB ____ (Docket No. 03-101, issued March 13, 2003); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

⁹ *Linda D. Guerrero*, 54 ECAB ____ (Docket No. 03-267, issued April 28, 2003); *Steven R. Lubin*, 43 ECAB 564, 573 (1992).

Section 10.516 of the implementing regulation¹⁰ provides in pertinent part:

“[The Office] shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter [the Office’s] finding of suitability. If the employee presents such reasons and [the Office] determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, [the Office]’s notification need not state the reasons for finding that the employee’s reasons are not acceptable.”¹¹

Section 10.517 of the regulation¹² further provides:

“(a) 5 U.S.C. § 8106(c) provides that a partially disabled employee who refuses to seek suitable work, or refuses to or neglects to work after suitable work is offered to or arranged for him or her, is not entitled to compensation. An employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified.

“(b) After providing the two notices described in sec[ti]on 10.516, [the Office] will terminate the employee’s entitlement to further compensation under 5 U.S.C. 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103.”¹³

ANALYSIS

The issue in this case is whether the Office properly invoked the penalty provision of 5 U.S.C. § 8106(c) on the grounds that appellant refused an offer of suitable work. The initial question to be resolved is whether the position was suitable. In reaching the determination that the position of modified tax specialist was suitable, the Office relied upon the opinion of Dr. Goldman, who was selected to resolve the conflict in the medical opinion evidence between Dr. Mehta and Dr. Shebairo on the issues of whether appellant had any continuing disability due to her accepted employment injury.

Office procedures require that an impartial medical specialist be a Board-certified physician unless the physician has special qualifications for performing the examination as documented by the Office medical adviser. These procedures, set forth in the Federal (FECA) Procedure Manual provide that, unlike the selection of second opinion examining physicians, selection of impartial physicians is made by a strict rotational system using the Physicians’

¹⁰ 20 C.F.R. § 10.516.

¹¹ *Id.*

¹² 20 C.F.R. § 10.517(a), (b).

¹³ *Id.*

Directory System which is a set of stand-alone software programs designed to support the scheduling of second opinion and impartial examinations. The database of physicians for impartial examinations was obtained from the Marquis Directory of Medical Specialists.¹⁴

In the instant case, Dr. Goldman cannot be considered an impartial specialist, as it cannot be ascertained that he is a Board-certified specialist. Furthermore, there is no indication in the record that Dr. Goldman has special qualifications for performing appellant's evaluation. His opinion, therefore, cannot be accorded the special weight accorded to an impartial specialist. Thus, as an unresolved conflict of opinion remains between Dr. Mehta, the physician for the Office, and Dr. Shebairo, appellant's treating physician regarding whether her work-related disability ended and whether she was capable of working, the Office has not met its burden to establish that appellant refused an offer of suitable work and, thus, invoke the penalty provision of 5 U.S.C. § 8106(c).

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c). In view of the disposition of the first issue, the Board finds that the Office improperly denied appellant's request for partial wage-loss compensation.

¹⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(1) (March 1994); see *Charles M. David*, 48 ECAB 543 (1997). The Marquis Directory provides a listing of physicians certified by the approved medical specialty boards that are members of the American Board of Medical Specialties (ABMS). The ABMS is an organization of 24 approved medical specialty boards. The intent of the certification of physicians is to provide assurance to the public that those certified by an ABMS Member Board have successfully completed an approved training program and an evaluation process assessing their ability to provide quality patient care in the specialty. "The Official ABMS Directory of Board Certified Medical Specialists," 33rd edition, (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 1, 2003 is hereby reversed.

Issued: June 7, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member